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No. 16-466

In the

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

PETITIONER,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

RESPONDENTS.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF *AMICUS CURIAE* GLAXOSMITHKLINE, LLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae GlaxoSmithKline, LLC ("GSK") is a pharmaceutical company that researches and develops vaccines, medicines, and consumer healthcare products. GSK is a Delaware limited liability company. Its sole member is GlaxoSmithKline Holdings (Americas) Inc., a Delaware corporation with its principal place of business in Delaware. *See Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 341 (3d Cir. 2013).

Like petitioner Bristol-Myers Squibb Company, GSK often faces mass tort lawsuits related to its products. In those suits, plaintiffs' attorneys begin by selecting a forum that they believe will be favorable, regardless of where their clients reside or where their clients were prescribed the medication that forms the basis of the suit. The attorneys then aggregate dozens or even hundreds of plaintiffs, most of whom have no connection with the chosen forum, to bring claims that also are untethered from the forum. As a result, GSK is forced to defend cases in states where it has no presence and where key witnesses are often unavailable to testify in person at trial.

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[1] Petitioner and respondents have filed blanket consent letters with the Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* and its counsel contributed monetarily to the preparation or submission of this brief. The parties were given timely notice of GSK's intent to file this brief.

GSK supports this petition because it presents an important, recurring question about the Court's due process jurisprudence as it relates to personal jurisdiction. The Court's precedents recognize that, absent "constant and pervasive" ties to a forum that render the defendant "at home" there, a court may exercise jurisdiction over the person of a defendant only when the claim itself is tied to the forum. California's "sliding-scale" approach to this fundamental question of a court's power guts important due process protections and renders defendants like GSK vulnerable to the most brazen and harmful kind of forum shopping.

This case offers a clean vehicle for addressing the entrenched split among the lower courts regarding the proper standard for determining whether a court may exercise specific personal jurisdiction over a defendant when the selected forum has no connection to the events underlying a plaintiff's claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the California Supreme Court effectively resurrected the theory of personal jurisdiction that this Court laid to rest just two years ago.

In *Daimler AG v. Bauman*, the Court held that a corporation is subject to general jurisdiction only where it is "at home," which typically means "where it is incorporated or has its principal place of business." 134 S. Ct. 746, 751, 760 (2014). *Daimler* reined in the "exorbitant exercises of all-purpose jurisdiction" — based merely on a corporation's

"continuous and systematic" contacts — that some prior case law had permitted. *Id.* at 761.

In a concession to reality, the California Supreme Court acknowledged that BMS is not "at home" in California and therefore not subject to general jurisdiction there. But the majority then emptied that holding of all its significance. Invoking the same "continuous and systematic" contacts that are concededly not enough for *general* jurisdiction, the majority found them sufficient for *specific* jurisdiction. It did so by loosening the "arising from" requirement — which is supposed to distinguish specific from general jurisdiction — until specific jurisdiction is no longer specific to the plaintiff's claim at issue and is really general jurisdiction by another name.

Under the decision below, a company with nationwide operations is subject to "specific" jurisdiction on virtually any claim, virtually anywhere. But there is something obviously wrong with a theory of "specific" jurisdiction that permits jurisdiction in any state in the nation even where the harm only occurs in a state outside the forum. As the three-justice dissent observed, "[w]hat the federal high court wrought in *Daimler* — a shift in the general jurisdiction standard from the 'continuous and systematic' test of *Helicopteros* to a much tighter 'at home' limit — this court undoes today under the rubric of specific jurisdiction." Pet. App. 50a–51a (Werdegar, J., dissenting).

The decision below cries out for review on both practical and doctrinal grounds. As a practical matter, the decision below will serve as an open

invitation for plaintiffs' lawyers to concentrate mass tort actions in the California courts. GSK is already facing several such suits in Los Angeles Superior Court, where plaintiffs' lawyers have used some California resident plaintiffs as the key to unlock the courthouse doors for dozens of non-California plaintiffs. The trial court has already followed the decision below and denied GSK's motion to quash for lack of personal jurisdiction.

Similar mass tort actions involving out-of-state plaintiffs who claim out-of-state injuries are pending in other jurisdictions favored by plaintiffs' lawyers, such as Missouri and Illinois. These jurisdictions are attractive to plaintiffs because of perceived favorable jurisdictional and discovery rulings, because of juries that plaintiffs' lawyers believe are more likely to award large verdicts, and because aggregating large numbers of plaintiffs makes it difficult if not impossible for defendants to defend.

Taking such a loose approach to specific jurisdiction in a mass tort action like this one exacerbates the threat to defendants' due process rights. As this Court has explained, "exorbitant" exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751. When a state court reaches out to decide a dispute that arose in a different state, the defendant will have trouble assembling the witnesses necessary to defend. State courts generally lack subpoena power outside the state's borders, making it difficult for defendants to obtain live testimony from critical witnesses like the prescribing physician. Without the ability to compel

these witnesses to testify at trial, the defendant's attorneys will often take an out-of-state deposition that doubles as both a discovery and a cross-examination deposition, and then try to splice together a video to present at trial. The result is an awkward presentation that lacks the force of a live cross-examination and that bears little resemblance to "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

The California Supreme Court's decision is also contrary to basic principles of federalism. A state lacks the constitutional authority to declare itself the hub of a nationwide multi-district litigation, reaching out to decide controversies that properly belong in other states. Nor should a state require its citizens to serve as jurors — in trials that can last weeks — to adjudicate disputes that lack any meaningful connection to the state.

What is more, the decision below complicates mass tort litigation by making difficult choice-of-law issues more likely to arise. When the plaintiff, the defendant, and the injury are all out of state, a court must decide whether to apply the substantive law of the state where the claim arose (often but not necessarily the plaintiff's home state) or the substantive law of the forum state. These issues make dispositive-motion practice and the development of jury instructions more convoluted, creating more opportunities for reversible error.

The decision below is an ideal vehicle for the Court to put an end to this inappropriate forum

shopping. This fact pattern arises frequently, and this case would have been decided differently in jurisdictions that employ a more rigorous "arising from" requirement. Although other pending petitions pose other questions about personal jurisdiction, none is likely to resolve the question presented here.

ARGUMENT

I. The Court Should Grant BMS's Petition.

A. The Question Presented Has Great Practical Importance.

BMS is not alone in facing mass tort litigation brought by out-of-state plaintiffs who ingested the drug at issue out of state and claim out-of-state injuries. Such plaintiffs routinely target GSK as well. GSK is a defendant in mass tort suits around the country where out-of-state plaintiffs use in-state plaintiffs as an anchor to select what their attorneys perceive to be favorable jurisdictions.

Like BMS, GSK is facing many of those suits in California, where GSK is not "at home" under *Daimler*. Over the last three years, plaintiffs' attorneys filed thirteen lawsuits in California state courts, which have been assembled in a coordinated proceeding in Los Angeles County Superior Court. The plaintiffs in these cases are mother-child pairs who allege that the unborn children were injured when their mothers ingested Paxil, a drug that is effective in treating depression, obsessive-compulsive disorder, and anxiety.

The thirteen complaints name twenty-seven California residents and thirty-one non-California

residents as plaintiffs. The non-California plaintiffs live in states all over the country, including Illinois, Pennsylvania, Kentucky, New Hampshire, Oklahoma, Michigan, Missouri, Arizona, Wisconsin, Wyoming, Louisiana, Texas, and Mississippi. They do not allege that their physicians prescribed Paxil in California, that the plaintiffs ingested Paxil in California, or any other facts linking their claims to California. Like the *BMS* plaintiffs, the complaints tether personal jurisdiction solely to the fact that GSK marketed and sold Paxil in California as a general matter — in-state sales that potentially give rise to claims by *other* plaintiffs, but not the claims of the out-of-state plaintiffs. The trial court has already invoked the California Supreme Court's decision and denied GSK's motion to quash for lack of personal jurisdiction. *See* Order Denying Defendant GlaxoSmithKline, LLC's Motion to Quash for Lack of Personal Jurisdiction of Non-California Plaintiffs, *Paxil II Product Liability Cases*, JCCP 4786 (Nov. 4, 2016). If left uncorrected, the decision below approving this tactic will further encourage plaintiffs' lawyers to concentrate nationwide mass actions in California.

Similar suits involving Paxil are also proceeding in Missouri and Illinois, both favored jurisdictions for plaintiffs' lawyers. In Missouri, ninety-six plaintiffs from over thirty different states joined with three from Missouri to sue GSK in St. Louis. *See Fitts et al. v. GSK*, Cause No. 1622-CC00539 (Mo. Cir. Ct.). In a previous matter in St. Louis, sixty-one non-Missouri plaintiffs combined their claims with those of four Missouri residents. *See Orrick v. GSK*, Cause No. 1322-CC00079-01 (Mo. Cir. Ct.). The court in

Fitts upheld personal jurisdiction as to the out-of-state plaintiffs' claims on the rationale that the *plaintiffs* had "consented to personal jurisdiction" and GSK's agent had been served in Missouri – skipping entirely over the question whether the nexus required by due process existed between the out-of-state plaintiffs' claims and GSK's Missouri contacts. *Fitts*, Order at 2-3 (Nov. 9, 2016).

Illinois is another example. There, six mother-child pairs from Florida, Colorado, Virginia, Michigan, and Wisconsin used one pair from Illinois as an anchor to sue GSK in the Circuit Court of Cook County. *See Meyers et al. v. GlaxoSmithKline, LLC*, 2016 IL App (1st) 151909, *pet. for leave to appeal filed* Sep. 30, 2016. In a twist on the theory endorsed by the court below, the out-of-state plaintiffs alleged that their claims arose out of GSK's clinical trial program for Paxil. That program had only the slightest of connections to Illinois: ninety-five percent of the over 300 trials did not have even a single study site or investigator in Illinois, and even the few trials that had a site in Illinois had the vast majority of their sites elsewhere. Although the plaintiffs did not allege that their claims had anything to do with the minuscule portion of the clinical trial program that occurred in Illinois, the trial court and the Illinois Appellate Court thought it was enough that the data from the handful of Illinois study sites — in the handful of trials that had even one Illinois site — was "aggregated" with the data GSK collected nationally and internationally. 2016 IL App (1st) 151909, at ¶ 52. Under that inappropriately relaxed approach to the "arising from" requirement, GSK would be subject to specific

jurisdiction essentially everywhere on essentially any claim.

Plaintiffs pick what their lawyers refer to as these "favorable jurisdictions" for a reason. William Cash, *Is It Time to Rethink the MDL for Mass Tort Cases?* The Trial Lawyer Magazine (Sept. 2015). Plaintiffs' lawyers believe that they can obtain favorable discovery and evidentiary rulings in these courts. And they consider the jury pools to be optimal. "It is certainly fair to summarize all of this by saying that juries in California put a higher value on personal injury cases than the average American does." Ronald V. Miller, Jr., "Average Injury Verdicts in California," Accident Injury Lawyer Blog (Dec. 15, 2010), *available at* http://www.accidentinjurylawyerblog.com/2010/12/average_injury_verdicts_in_cal.html.

As another plaintiffs' lawyer explained, "What I call the 'magic jurisdiction' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges . . . and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is." Richard "Dickie" Scruggs, Asbestos for Lunch, panel discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc., New York), June 11, 2002, at 5.

B. The Decision Below Violates Due Process and is Contrary to Principles of Federalism.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). These constitutional limits "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* at 292.

The decision below disregards these principles and imposes constitutionally problematic burdens on defendants. Most notably, it is difficult for defendants to obtain live trial testimony from out-of-state witnesses, such as the plaintiff's doctors, family, friends, and co-workers. This problem is particularly acute when it comes to the prescribing physician, who is typically one of the most important witnesses. That doctor will testify about why she prescribed the drug, whether a different warning would have changed her treatment recommendation, and what the drug was intended to treat. Under the learned intermediary doctrine, moreover, a manufacturer fulfills its duty to warn by advising the prescribing physician of the risks, meaning that the physician's testimony can be crucial. *See, e.g., Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966); *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 42 (Ill. 2002) (manufacturers of prescription drugs need not warn patients directly, but must "warn prescribing physicians . . . of the product's known dangerous propensities").

But getting the doctor's testimony is a tricky endeavor. Doctors generally do not jump at the opportunity to testify, particularly in jurisdictions far from home. And they cannot be compelled to do so, because state courts do not have the power to compel out-of-state witnesses to attend trial. *See, e.g.*, *Gridley v. State Farm Mut. Ins. Co.*, 840 N.E.2d 269, 279 (Ill. 2005) ("Illinois courts do not have subpoena power in Louisiana, so . . . State Farm would not be able to compel the attendance of the Louisiana witnesses in Illinois.").

In practice, then, the defendant will depose the doctor in her home state. To do so, the defendant often must ask the court in the plaintiff's chosen forum to authorize the taking of the foreign deposition. *See, e.g.*, Commission to Take Deposition Outside California, http://www.courts.ca.gov/documents/disc030.pdf. Then, the defendant often hires a local lawyer in the physician's state and files a separate lawsuit in a local court in order to obtain the foreign jurisdiction's authorization to take the deposition.

At the deposition, the defendant faces a strategic dilemma. The defendant cannot compel the doctor to appear at trial, so the deposition video may be the only way to present the doctor's testimony to the jury. But the defendant's attorney has not spoken with the doctor, because most states do not allow *ex parte* discussions by defense counsel with a plaintiff's doctor. As a result, the defendant does not know what the doctor is going to say.

So the defendant has two unpalatable choices. It can combine a discovery and a cross-examination

deposition into one, requiring defense counsel to artfully begin with open-ended questions and to close them off with cross-examination questions developed on the spot. Then, the defendant can edit and splice together the deposition clips, inevitably resulting in a disjointed and awkward presentation. Or the defendant can try to depose the doctor twice, if the defendant can persuade the forum state's court and the local court to allow it (a difficult thing to do).

In either event, the jury is deprived of the benefit of live testimony. And the defendant is denied the opportunity to prepare and deliver an effective cross-examination — "[t]he age-old tool for ferreting out truth in the trial process." *Perry v. Leeke*, 488 U.S. 272, 283 (1989). Instead, the judge turns down the lights, the screen comes on, and the jurors begin nodding off. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to the court, jury or most litigants."). In an effort to liven things up, two attorneys will sometimes role-play by reading the deposition transcript aloud. But that artificial solution does not solve the problem, because the jury still cannot view the witness's demeanor. Moreover, without witnesses actually present, the defendant cannot ask them questions tailored to what has occurred at trial.

An example from the *Orrick* case in Missouri (*see supra* at 8) illustrates this problem. As explained, that case involved a large number of out-of-state plaintiffs who used a handful of Missouri plaintiffs as

an anchor. The first claim set for trial involved a plaintiff from West Virginia, and the plaintiff's mother's testimony about other drugs she had ingested, other risk factors, and warnings she had seen was highly relevant. Shortly before trial, however, plaintiff's counsel replaced the mother with the plaintiff's grandmother as the next friend of the plaintiff and decided not to bring the mother to trial. As a result, GSK would not have been able to compel critically important witnesses in the case — the mother and the out-of-state prescribing physicians — to testify in front of the Missouri jury.

The decision below is also contrary to principles of federalism. Another purpose of personal jurisdiction is to protect state sovereignty. "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States — a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen*, 444 U.S. at 293. For that reason, a state lacks the constitutional authority to decide claims that lack the requisite connection to the state. *Id.*

The California Supreme Court's view — that a defendant with nationwide operations may be forced to defend virtually any claim in virtually any state — cannot be reconciled with these principles. The decision below usurps the authority of other states that have a stronger interest in adjudicating these claims. *See Daimler*, 134 S. Ct. at 762 n.20 ("Nothing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of . . .

activity' having no connection to any in-state activity.").

The decision below also imposes inappropriate burdens on the California courts and the California citizens who would be called upon to serve as jurors. The typical pharmaceutical product-liability trial lasts three weeks or more, and "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil*, 330 U.S. at 508-09. Those burdens are civic duties that must be borne when the defendant resides in the forum state or the claim arises from the defendant's forum-state contacts. But where the plaintiff, the defendant, the defendant's challenged conduct, and the claimed injury are all out of state, a state court does not have the constitutional authority to effectively designate itself the hub of a nationwide multi-district litigation.[2]

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[2] The doctrine of forum non conveniens grounds is not an adequate substitute for the due process protections embodied in this Court's personal jurisdiction jurisprudence. Unlike the decision whether to dismiss for lack of personal jurisdiction, a forum non conveniens determination "is committed to the sound discretion of the trial court." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *see also, e.g.*, *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991) ("Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise . . . jurisdiction . . . .").

C. The Decision Below Imposes Additional Burdens on Parties and Courts.

Aside from the due process and federalism problems discussed above, the decision below creates difficult choice-of-law issues. When a plaintiff resides out of state and suffered her alleged injuries out of state, the forum court must wrestle with what state's law to apply. For example, if the plaintiff lives in Mississippi and her claim arose there, does the forum court apply Mississippi substantive product-liability law? In California, if there is a conflict between state laws, "the court analyzes the jurisdictions' respective interests to determine which jurisdiction's interests would be more severely impaired if that jurisdiction's law were not applied in the particular context presented by the case." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 100 (2006). In cases with plaintiffs who reside in dozens of different states, the difficulties multiply exponentially.

Divergent state laws can make a significant difference. For example, unlike in California, Mississippi's Product Liability Act expressly subsumes common-law claims, leaving plaintiffs with a statutory cause of action only. *See* Miss. Code. Ann. 11-1-63. In Pennsylvania, a plaintiff must prove punitive damages by a preponderance of the evidence; in Mississippi, clear and convincing evidence is required. *Compare Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. 1995), *with Muirhead v. Cogan*, 158 So. 3d 1259, 1266 (Miss. Ct. App. 2015). In North Carolina, a plaintiff's contributory

negligence (of any degree) deprives the plaintiff of the right to recover. *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, 774 S.E.2d 421, 426 (N.C. Ct. App. 2015). By contrast, in California, a negligent plaintiff may still recover. *Harb v. City of Bakersfield*, 233 Cal. App. 4th 606, 626 (2015), *review denied* (Apr. 29, 2015).

After deciding what law to apply, the parties and the court must develop jury instructions. This often happens in the charged and frantic atmosphere of trial, as attorneys must haggle over and turn a foreign jurisdiction's law into a format accessible to a jury. The foreign jurisdiction sometimes has no pattern jury instructions to rely on. And even when it does, the parties and the court often must splice together the foreign jurisdiction's substantive law with the forum state's procedural law. It is no surprise that reversible error often occurs. For these reasons, "[t]here is an appropriateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509.

The choice-of-law problem also makes it necessary to try cases with plaintiffs from multiple states individually. Because these trials happen one by one, the few in-state plaintiffs' claims are sometimes never litigated — further confirming that the in-state plaintiffs serve only a forum-shopping purpose. In similar cases in Missouri involving Johnson & Johnson, the three cases tried to date involved plaintiffs from Alabama, South Dakota, and

California. *See Hogans et al. v. Johnson & Johnson et al.*, Cause No. 1422-CC09012-01 (Jan. 7, 2016). In the Missouri Paxil cases, the first case set for trial involved a plaintiff from West Virginia. When a state court hosts what amounts to a nationwide multi-district litigation in which in-state plaintiffs barely participate, that is a sure sign that something is amiss.

D. The Petition Presents the Court With an Opportunity To Resolve a Well-Developed Split Involving Federal Courts of Appeals and State High Courts.

As the petition explains, the decision below further entrenches a well-developed and acknowledged split on how to interpret the "arising from" requirement — or, more to the point, whether there *is* an "arising from" requirement — for specific jurisdiction. Pet. 9-20. Many courts hold that a defendant's forum-state contacts must be the "but for" or "proximate" cause of the plaintiff's injuries. *See, e.g., Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1079 (10th Cir. 2008); *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005). The Supreme Court of Arizona also subscribes to this view. *See Williams v. Lakeview Co.*, 13 P.3d 280, 284-85 (Ariz. 2000).

A minority of courts, by contrast, reject a causation requirement altogether, reasoning that some "relationship" between the suit and the defendant's forum-state contacts is enough even if that "relationship" is not a causal one. *See, e.g.*,

Avocent Huntsville Corp. v. Aten Int'l Co., 552 F.3d 1324, 1336-37 (Fed. Cir. 2008). In the decision below, the California Supreme Court decisively adopted the minority view, describing the test as whether "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." Pet. App. 21a.

To be sure, other courts have not addressed the precise situation where out-of-state plaintiffs use a handful of in-state plaintiffs as an anchor to sue in their lawyers' preferred jurisdiction. But a split on these exact facts is unlikely ever to arise, given that plaintiffs' lawyers pick only favored jurisdictions whose courts have signaled that they welcome such filings. Plaintiffs' lawyers are not likely to bring this type of case in Arizona, for example, which requires a "causal nexus between the defendant's . . . activities and the plaintiff's claims." *Williams*, 13 P.3d at 284-85. Instead, if the decision below is allowed to stand, plaintiffs' lawyers will continue to assemble nationwide mass tort actions in California.

II. The *BMS* Case Is An Ideal Vehicle For Resolving the Question Presented.

A. The Fact Pattern In *BMS* Is Typical.

As explained, GSK faces mass tort suits in various jurisdictions that are materially indistinguishable from this one. If this Court were to reverse the decision below, the Court's decision would apply to all of GSK's pending cases. In addition, as explained in the PhRMA amicus brief, this case would resolve personal jurisdiction in many other

similar suits against other pharmaceutical manufacturers.

The *BMS* case is also an excellent vehicle because it clearly would have been decided differently in jurisdictions that use a "but for" or "proximate" causation standard. The majority below held that Bristol-Myers' "nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between [respondents'] claims and the company's contacts in California concerning Plavix." Pet. App. 28a. That kind of amorphous "nexus" would not be enough to satisfy the "but-for" or "proximate" causation standards, because the out-of-state plaintiffs in *BMS* would have suffered the same alleged injuries even if Bristol-Myers had never set foot in California.

If a physician prescribes a medication to a plaintiff in Florida and the plaintiff ingests the medication and suffers her alleged injuries in Florida, the defendant's marketing or distribution activities in *California* did not give rise to the plaintiff's injuries. The defendant's California activities may have given rise to other people's claims, in California, and those claims may resemble the Florida plaintiff's claims. But resemblance is not causation. In fact, the majority did not dispute that respondents' "claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California." Pet. App. 29a. Under the infinitely malleable "substantial nexus" standard, it was possible for the court below to conclude that the plaintiffs' claims are related to Bristol-Myers' activities in California, but not even an

adventuresome court could declare that Bristol-Myers' California contacts are a *cause* of the out-of-state plaintiffs' claims.

B. Other Petitions Are Unlikely To Resolve the Question Presented.

Other pending petitions pose other personal jurisdiction questions, but none would resolve the question presented here. Granting those petitions would not be a substitute for granting BMS's petition.

1. *TV Azteca et al. v. Gloria de los Angeles Trevino Ruiz*, No. 16-481, is an intentional tort case that is more about the reach of *Walden v. Fiore*, 134 S. Ct. 1115 (2014), than *Daimler*. In *Walden*, the plaintiffs alleged that the defendant, a police officer, improperly seized and refused to return gambling proceeds. *Walden*, 134 S. Ct. at 1119. Although the seizure occurred in Georgia, the plaintiffs sued in Nevada, arguing that the officer knew that "his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada" and thus cause injury in Nevada. *Id.* This Court held that the officer did not have minimum contacts with Nevada because the "relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction." *Id.* at 1126.

TV Azteca appears to turn on the application of *Walden*'s minimum contacts and purposeful availment analysis, not *Daimler*'s general vs. specific jurisdiction framework. In *TV Azteca*, Texas

residents alleged that Mexican citizens defamed them by "broadcast[ing] television programs on over-the-air signals that originate in Mexico but travel into parts of Texas." *TV Azteca* Pet. App. 1a.

After discussing *Walden*, the Texas Supreme Court approved the exercise of specific jurisdiction over the Mexican citizens. The court reasoned that the purposeful availment requirement was satisfied because the Mexican citizens "exploited the Texas market to capitalize on the broadcasts that traveled into Texas." *Id.* at 2a. Although the defendants did not intentionally direct the over-the-air signals to Texas, the defendants "took specific and substantial actions to take advantage of the fact that the signals reach into Texas and to financially benefit from that fact." *Id.* at 36a. The court also concluded that the plaintiffs' claims "arise from and relate to those broadcasts" because the plaintiffs resided in Texas and suffered injuries from viewing the broadcasts in Texas. *Id.* at 2a.

TV Azteca bears little resemblance to this case. Although the *TV Azteca* petition invokes the same circuit split at issue here, the difference is that the *TV Azteca* plaintiffs reside in Texas and suffered their injuries in Texas. In contrast, the *BMS* plaintiffs reside outside California and suffered their alleged injuries outside California. The central question in *TV Azteca* is whether the defendants' broadcasting of television programs in Mexico, with knowledge that they would also be viewed in Texas, satisfied the purposeful availment requirement for specific jurisdiction. The question is not whether the plaintiffs' claims arise out of the defendants' forum-

state contacts — they do, as the broadcast reached into Texas and allegedly injured Texas residents in Texas — but rather whether the defendants' forum-state contacts are too slim to support jurisdiction *even though* the claims arise out of those contacts. If this Court were to resolve that question, it would have little or no effect on the decision below.

2. In *BNSF Railway Company v. Tyrrell*, No. 16-405, the question presented involves general rather than specific jurisdiction. Although BNSF is not incorporated in Montana and does not maintain its principal place of business there, the Montana Supreme Court held that the Federal Employers' Liability Act authorizes state courts to exercise general jurisdiction. The court relied on a provision of the FELA, rather than general principles of personal jurisdiction. *See* 45 U.S.C. § 56 ("Under this chapter an action may be brought in a district court of the United States . . . in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."). The question in that case is thus whether the FELA allows state courts to exercise general jurisdiction even when the defendant is not "at home" in the forum state under *Daimler*. Whatever the answer to that question of *general* jurisdiction in FELA cases, it does not address whether a company is subject to *specific* jurisdiction over the claims of out-of-state plaintiffs who claim out-of-state injuries.

3. *Mylan Pharmaceuticals v. Acorda Therapeutics, Inc.*, No. 16-360, is about whether

anticipated *future* conduct can support specific jurisdiction. The question presented is "[w]hether the mere filing of an abbreviated new drug application by a generic pharmaceutical manufacturer is sufficient to subject the manufacturer to specific personal jurisdiction in any state where it might someday market the drug." *Mylan Pharmaceuticals* Pet. i.

The Federal Circuit determined that the filing of such an application subjects a defendant to specific jurisdiction when the filing "reliably indicate[s] plans to engage in" marketing in the forum state. *Mylan Pharmaceuticals* Pet. 1. The issue in *Mylan Pharmaceuticals* thus turns on whether predictions about the future can be enough to support specific jurisdiction, or whether courts must rely only on the defendant's "actual suit-related conduct at the time of the suit." *Id.* at 2. Because *BMS* does not involve anticipated future conduct, a grant of certiorari in *Mylan Pharmaceuticals* will not resolve the question here.

GSK takes no position on whether the Court should grant *TV Azteca*, *BNSF Railway Company*, or *Mylan Pharmaceuticals*. But the Court should not grant them in place of *BMS*.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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